***United States Court of Appeals***

***for the Second Circuit***


# APPELLEE'S BRIEF

ORIGINAL 75-7185

# United States Court of Appeals

**For the Second Circuit**

B P/S

CINEMA 5, LTD.,

*Plaintiff-Appellant,*

*against*

CINERAMA, INC., NATIONWIDE THEATRES CORP., CONSOLIDATED AMUSEMENT CO., LTD., PACIFIC THEATRES CORPORATION, ATLANTIC THEATRES CORP. OF CALIFORNIA, RKO-STANLEY WARNER THEATRES, INC., WILLIAM R. FORMAN, MICHAEL R. FORMAN and JAMES J. COTTER,

*Defendants-Appellees.*

**Appeal from the United States District Court for the Southern District of New York**

## BRIEF FOR DEFENDANTS-APPELLEES

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## BRIEF FOR DEFENDANTS-APPELLEES

### Statement of the Case

Defendants-appellees submit this brief in opposition to the appeal by plaintiff-appellant from the memorandum and order of the Honorable Charles L. Brieant, Jr., dated February 14, 1975, disqualifying plaintiff's counsel on the ground that a member of the firm representing plaintiff in this antitrust action is also a member of the firm presently

representing Cinerama, a defendant herein, in two antitrust actions previously brought in the Western District of New York and "there is sufficient relationship between the two law firms, and the two controversies to suggest that future confidential communications in the prior cases will be inhibited" (119a).*

Judge Bricant's decision, based on the stipulated facts and affidavits, was rendered after oral argument was had and briefs were filed by both sides. On April 3, 1975, Judge Bricant granted plaintiff's motion for reargument and permitted the submission of additional affidavits and briefs. After hearing further oral argument on May 7, 1975, he adhered to his original determination, finding "that there is sufficient relationship between the issues in the Western New York litigation and the issues which may be raised of the pleadings in this litigation, geographic differences very slight, but the connection so great as to create an appearance of profesional impropriety . . ." (157a).

Having found a "nexus" (161a) between the pending litigations, "each [of] which requires extensive, specialized knowledge on the part of counsel concerning the booking and distribution of motion pictures . . ." (118a), Judge Bricant held that plaintiff's counsel were disqualified under the rule first articulated by Judge Weinfeld in *T.C. & Theatre Corp.* v. *Warner Bros. Pictures, Inc.*, 113 F. Supp. 265 (S.D.N.Y. 1953) (119a) and subsequently confirmed in a long line of cases, most recently in *Hull* v. *Celanese Corporation*, 513 F.2d 568 (2d Cir. 1975), and *Silver Chrysler*

* All page references, unless otherwise indicated, refer to pages of the Joint Appendix.

*Plymouth, Inc.* v. *Chrysler Motors Corporation,* No. 74-1104 (2d Cir. May 23, 1975) (slip op. 3669).

As this Court held in *Hull*:

> "The district court bears the responsibility for the supervision of the members of its bar .... The dispatch of this duty is discretionary in nature and the finding of the district court will be upset only upon a showing that an abuse of discretion has taken place." 513 F.2d at 571.

Defendants contend, and the record shows, that there has been no abuse of discretion in this case.

## The Issue Presented

The sole issue for review is whether the District Court properly exercised its discretion in disqualifying the law firm representing plaintiff on the ground that when this action was commenced a partner of that firm was, and still is, representing one of the defendants herein in other litigation substantially related to the instant case.

## The Facts

In January, 1972, Cinerama, Inc., one of the defendants in this action, retained Manly Fleischmann, Esq. to represent it and its wholly-owned subsidiary Cinerama Releasing Corp., Inc. in the defense of a civil antitrust action brought in the Western District of New York (47a). In March, 1974, Mr. Fleischmann was retained in a second similar action in that district (94a).

On August 15, 1974, plaintiff commenced the present action, charging Cinerama, *inter alia,* with conspiring in vio-

lation of the federal antitrust and securities laws. The law firm of Webster Sheffield Fleischmann Hitchcock & Brookfield ("Webster Sheffield"), of which Manly Fleischmann is a partner, represents plaintiff. Mr. Fleischmann divides his time between Webster Sheffield and his Buffalo firm, Jaeckle, Fleischmann & Mugel, "usually spending Tuesday, Wednesday and Thursday in New York and the balance of the week in Buffalo" (24a). It is Mr. Fleischmann's partnership in Webster Sheffield and the antitrust character of the several lawsuits which mandate disqualification here.

**The Relevant Litigation**

The complaint in the instant action (5a *et seq.*) asserts that both plaintiff and Cinerama are engaged in the business of distributing films and operating motion picture theatres (6a-7a) and charges, in substance, a conspiracy by all the defendants to acquire control of plaintiff in violation of Section 13(d) of the Securities Exchange Act of 1934, 15 U.S.C. §78m(d), Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§1, 2, and Section 7 of the Clayton Act, 15 U.S.C. §18. The securities violations alleged are technical in nature; the thrust of the complaint is antitrust (148a).

Paragraphs 36 and 38 of the complaint (17a-19a) allege:

> "36. RKO is a subsidiary of Cinerama. Both companies are controlled by Forman, whose entertainment empire includes over 350 motion picture theatres located in the United States and foreign countries. Forman's huge resources give him and his companies enormous power and leverage in competing against other firms in the industry.

"38. The effect of defendants' acquisition of Cinema 5, so that the combined film buying power of RKO and Cinema 5 may be used to restrain competition in the acquisition and exhibition of first-run films in Manhattan, may be substantially to lessen competition or to tend to create a monopoly in New York City's first-run motion picture theatre market, all in violation of Section 7 of the Clayton Act, in that:

* * *

(iii) Forman's planned theatre complex in New York City (Cinema 5-RKO) will be able to foreclose competition far beyond what its approximately 33% market share would suggest, due to Forman's enormous leverage and buying power in the motion picture industry as a whole . . . ."

These allegations plainly extend to Cinerama's worldwide activities in the motion picture industry.

The complaint in the first action filed in the Western District of New York in which Mr. Fleischmann was retained to represent Cinerama (36a *et seq.*) charges all the defendants with conspiring to restrain trade in the business of distributing and exhibiting motion pictures in violation of the antitrust laws of the United States and thereby damaging the plaintiffs' business as an operator of motion pictures in Rochester. Paragraph 18 of that complaint (41a) alleges:

"18. The feature motion pictures distributed by the Distributor Defendants* have, during the past four years, shared more than half of the total box office market for all feature motion picture films distributed in the United States during said period. It

* Cinerama is one of the Distributor Defendants.

> is impossible for any exhibitor to compete in his area without access to the films of the Distributor Defendants."

The complaint in the second such action (80a *et seq.*) is similar, and relates to motion picture distribution and exhibition in Buffalo.

Recognizing the need for extensive background information to enable him effectively to undertake his representation of Cinerama, Mr. Fleischmann wrote to Cinerama's Los Angeles counsel on March 2, 1972, as follows:

> "Before we can properly and adequately proceed any further with a meaningful defense to plaintiffs' action, *we are in need of a great deal of information concerning the nature and extent of the activities of Cinerama, Inc., and Cinerama Releasing Corporation* and in particular their activities in the area to which this action pertains." (55a-56a) (emphasis added).

The letter specified a wide variety of documents desired for the "conduct of depositions and discovery" (56a) and further stated "it would be extremely helpful if you could advise us as to knowledgeable individuals we could contact and confer with in your Buffalo office and New York City office" (*Id.*).

In the course of his representation of Cinerama, Mr. Fleischmann's Buffalo firm has filed an answer to the complaint in both of the Western District actions (33a) and, in the first action, answers and supplemental answers to plaintiffs' interrogatories, responses to plaintiffs' second set of interrogatories, and a reply to plaintiffs' first request for admissions (*Id.*). It is apparent from these documents that the information furnished by Cinerama to

Mr. Fleischmann's Buffalo firm has not been confined to Cinerama's activities in the Rochester area.*

There is, of course, no assurance that information found to be necessary in the future will not—as it already has—cross the geographical boundaries of the Western District. Indeed, the likelihood is to the contrary, since discovery is still in the early stages. Moreover, as the District Court observed, the inner workings of Cinerama are likely to be the same in Rochester and Buffalo as in Manhattan (160a). In any event, Cinerama's activities in the Western District of New York are pertinent to the various allegations of the complaint herein relating to defendants' "enormous leverage and buying power in the motion picture industry as a whole" (19a).**

In short, material relevant to the defense of Cinerama in the Western District litigation may have a bearing on the issues in this action. The conflict thus precipitated by plaintiff's retainer of Webster Sheffield was tacitly recognized by Mr. Fleischmann himself, in his letter of September 16, 1974 (29a) offering to withdraw from further representation of Cinerama.

**Other Litigation Involving Plaintiff**

In an effort to obfuscate the issues on this motion, plaintiff discusses at great length two other lawsuits in which there has been no motion to disqualify (see, *e.g.*, Pltf's

* See answers to interrogatories 7 and 13, which are not reproduced in the Joint Appendix but are annexed as Exhibit C to the Stipulation of Facts which was filed herein on October 17, 1974 and is included in the Record on Appeal.

** Plaintiff will certainly seek discovery based on these allegations in support of its Clayton Act claim. Violations of Section 7 must be proved; there is no such thing as an "almost per se violation" as suggested by plaintiff on this appeal (Pltf's Br. p. 7).

Br. pp. 15-20). Judge Bricant was fully apprised of those cases, and correctly ruled that whether a motion had been made there was of "no significance" (148a; see also, 154a).

Cinerama is not a party in either of the cases.

The first is a derivative action brought in the Southern District of New York in October, 1974 by Consolidated Amusement Co., Ltd., another defendant in this action (122a).* The complaint charges plaintiff, its directors and certain purchasers of plaintiff's stock with violations of the federal securities laws. As plaintiff concedes, it is not represented by Webster Sheffield in that action (153a).

The second is a special proceeding in the Supreme Court of the State of New York brought in October, 1974 by Consolidated, as a stockholder of plaintiff, to enforce its statutory right to inspect plaintiff's list of stockholders (122a). Under New York law, the only issue which may be tried in such a proceeding is whether the inspection is sought for a proper corporate purpose. See *Matter of Steinway*, 159 N.Y. 252 (1899).

No antitrust issue is raised by the complaint in the derivative action or the petition in the stockholder's proceeding. That issue is raised solely by way of affirmative defense. Antitrust, which is at the heart of the relationship between this action and the Western District actions, is, at most, peripheral to the litigation brought by Consolidated.

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* Cinerama is a publicly-owned corporation. Consolidated is owned by Mr. William Forman. Mr. Forman is a Cinerama stockholder. Consolidated, however, is not an affiliate or subsidiary of Cinerama. Consolidated's business is confined to the operation of a chain of motion picture theatres in Hawaii. Unlike plaintiff and Cinerama, Consolidated is not engaged in the distribution of films.

Although plaintiff contends that the motion to disqualify was "designed to gain a tactical advantage by preventing further proceedings in this case . . . while defendants sought to push ahead with their own actions" (Pltf's Br. p. 20), Judge Brieant found that such was not defendants' motive (156a, 160a). Moreover, the fact is that no such advantage has been or will be gained; discovery has not yet started in the derivative action and a hearing is not scheduled to be held in the stockholder's proceeding until November, 1975.

## ARGUMENT

**The District Court properly exercised its discretion in disqualifying plaintiff's attorneys because their continued participation in this case would inhibit communications between Cinerama and its counsel in the Western District litigation.**

### A. Canon 4 and Canon 9 of the Code of Professional Responsibility embody the applicable legal standards.

As this Court noted in *Hull* v. *Celanese Corporation*, 513 F.2d 568, 571 (2d Cir. 1975): "While the Code of Professional Responsibility has not been formally adopted in the Southern District, its salutary provisions have consistently been relied upon by the courts of this district and circuit in evaluating the ethical conduct of attorneys."* Here, as in *Silver Chrysler Plymouth, Inc.* v. *Chrysler Motors Corporation*, No. 74-1104 (2d Cir. May 23, 1975) (slip op. 3669,

* The Code of Professional Responsibility of the American Bar Association was adopted by the New York State Bar Association as of January 1, 1970, and is reprinted in the New York Judiciary Law, App. at 55-98 (McKinney Supp. 1971).

3672), Canon 4 and Canon 9 of the Code are the "starting point."

Canon 4 provides:

> "A Lawyer Should Preserve the Confidences and Secrets of a Client."

Ethical Consideration 4-1, explaining Canon 4, states:

> "Both the fiduciary relationship existing between lawyer and client and the proper functioning of the legal system require the preservation by the lawyer of confidences and secrets of one who has employed or sought to employ him. *A client must feel free to discuss whatever he wishes with his lawyer and a lawyer must be equally free to obtain information beyond that volunteered by his client.*" (emphasis added).

Ethical Consideration 4-5 further explains:

> "A lawyer should not use information acquired in the course of the representation of a client to the disadvantage of the client and a lawyer should not use, except with the consent of his client after full disclosure, such information for his own purposes . . . . Care should be exercised by a lawyer to prevent the disclosure of the confidences and secrets of one client to another, and no employment should be accepted that might require such disclosure."

Canon 9 provides:

> "A Lawyer Should Avoid Even the Appearance of Professional Impropriety."

Ethical Consideration 9-6 cautions:

> "Every lawyer owes a solemn duty to . . . conduct himself so as . . . to inspire the confidence, respect, and trust of his clients and of the public; and to strive

to avoid not only professional impropriety but also the appearance of impropriety."

Additionally, Disciplinary Rule 5-105 of the Code provides in pertinent part:

(B) "A lawyer shall not continue multiple employment if the exercise of his independent professional judgment in behalf of a client will be or is likely to be adversely affected by his representation of another client, except to the extent permitted under DR5-105(C).

(C) "In the situations covered by DR5-105(B), a lawyer may represent multiple clients if it is obvious that he can adequately represent the interest of each and if each consents to the representation after full disclosure of the possible effect of such representation on the exercise of his independent professional judgment on behalf of each."

In his authoritative work on *Legal Ethics* (1965), Drinker admonishes:

"One representing B against C, may not at the same time represent C against D; nor may a lawyer, a friend of both husband and wife, who represents the wife in a divorce action, accept a retainer from the husband on certain business matters and in a negligence case; nor can he make the latter proper by withdrawing as counsel for the wife." (p. 113)

Wise, in *Legal Ethics* (1966), adopts a similar standard:

"As was said at the outset 'No man can serve two masters.' If there is the slightest doubt as to whether or not the acceptance of professional employment will involve a conflict of interest between two clients or with a former client, or a conflict between the interests of

> any client and that of the attorney, or may require the use of information obtained through the service of another client, the employment should be refused." (p. 273)

In this case, so long as Webster Sheffield continues to represent plaintiff, Cinerama will hardly "feel free to discuss whatever it wishes" with Mr. Fleischmann, and, by the same token, Mr. Fleischmann will not be at liberty "to obtain information beyond that volunteered" by Cinerama. There is, indeed, more than the "slightest doubt as to . . . a conflict of interest between two clients."

**B. The Canons require disqualification in view of the substantial relationship between the cases pending in the Western District and the instant action.**

Judge Brieant expressly found that "there is sufficient relationship between the two law firms, and the two controversies to suggest that future confidential communications in the prior cases will be inhibited" (119a). This finding clearly satisfies the " 'substantially related' test" (*Silver Chrysler Plymouth, Inc.* v. *Chrysler Motors Corporation,* No. 74-1104 (2d Cir. May 23, 1975) (slip op. 3669, 3675), the legal yardstick in this Circuit, which is designed "to guard against the danger of inadvertent use of confidential information." *Ceramco, Inc.* v. *Lee Pharmaceuticals,* 510 F.2d 268, 271 (2d Cir. 1975). The test does not require that the issues be "exactly the same" (Pltf's Br. p. 24), as plaintiff in effect urges, but that there be a "threshold quantum of similarity between the prior and current representations . . . ." *Silver Chrysler Plymouth, Inc.* v. *Chrysler Motors Corporation,* No. 74-1104 (2d Cir. May 23, 1975) (slip op.

3669, 3686-87) (concurring opinion). The instant record establishes far more than a "threshold quantum."

This is not just the typical case of " 'side switching' and of the conflict of interest which is almost certain to arise when counsel changes sides" (*General Motors Corporation* v. *City of New York*, 501 F.2d 639, 650 n.20 (2d Cir. 1974)), but an *a fortiori* case; here, members of the same firm are simultaneously representing clients with adverse interests. Thus, while Mr. Fleischmann is defending Cinerama in motion picture antitrust litigation, his partners are suing Cinerama for alleged conspiracy to violate the antitrust laws in the motion picture field. The antitrust charges in the Southern District, moreover, are made in the context of an alleged fight for control of plaintiff (148a)—a fight in which plaintiff might well seek to use any inside information regarding Cinerama, whether or not specifically related to plaintiff's antitrust claims in this action.

The significance of information as to "policies, trade practices . . . methods of operation and procedures" was stressed in *Motor Mart, Inc.* v. *Saab Motors, Inc.*, 359 F. Supp. 156, 157 (S.D.N.Y. 1973). Judge Pollock there disqualified the plaintiff's attorney, who some 12 years previously had been retained as counsel by the defendant, saying:

> "The prior representation made possible his exposure to business methods and confidential information, giving rise in the present action to an appearance of conflict of interest. Even if his relationship with Saab Motors was relatively small and even if the prior action did not raise issues identical to those involved herein, his past activities raise a shadow over his present involvement." (*Id.* at 158.)

Nor can the fact be ignored that the litigation here involved is in the antitrust area. In *Chugach Electric Association* v. *United States District Court,* 370 F.2d 441 (9th Cir. 1966), the attorney for the plaintiff was disqualified on the ground that he had formerly been general counsel for the defendant, although he had resigned prior to the time that the "agreements were reached and overt acts taken" (*Id.* at 443) which gave rise to the antitrust claim in issue. As the court observed:

> "A likelihood here exists which cannot be disregarded that Mr. Boyko's knowledge of private matters gained in confidence would provide him with greater insight and understanding of the significance of subsequent events in an antitrust context and offer a promising source of discovery. This likelihood is enhanced by recognition of the fact that the allegations of a complaint are not always an accurate appraisal of the relevant period of time in antitrust cases. Discovery and trial proof frequently introduce ramifications rendering earlier events relevant." (*Id.*)

The precedent most apposite on its facts is *Estates Theatres, Inc.* v. *Columbia Pictures Industries, Inc.,* 345 F. Supp. 93 (S.D.N.Y. 1972). There, an attorney (Mr. Ruskay) who represented a theatre chain (UATC) in a pending antitrust action was disqualified from representing the plaintiff in a different antitrust action in which the chain was named as co-conspirator (but not as a defendant). Judge Weinfeld summarized the theatre chain's position as follows:

> "In sum, UATC's position is that it does not consent to Mr. Ruskay's continued representation of plaintiff since the latter accuses UATC of being a member

> of an antitrust conspiracy directed against plaintiff." (*Id.* at 97.)

*Mutatis mutandis,* Cinerama's position may likewise be summarized:

> In sum, Cinerama's position is that it does not consent to Webster Sheffield's continued representation of plaintiff since the latter accuses Cinerama of being a member of an antitrust conspiracy directed against plaintiff.

The claims involved in *Estates Theatres* covered different periods of time (*Id.* at 98) and were not identical, but, rather, "not unlike." (*Id.* at 96). The disqualified attorney therefore argued that there was "no *substantial* conflict of interest" (*Id.* at 98) (emphasis in original). Judge Weinfeld rejected his argument:

> "I cannot accept the rather fine distinction which Mr. Ruskay seeks to establish—in effect to measure the impact of the conflict upon his client's interests . . . . For the Court to do so would require it to speculate as to the course a litigation would take and would tend to undermine the confidence of clients that their counsel would be constant in their loyalty to their interests, a confidence essential to our adversary legal process . . . . [C]onsiderations of public policy, not less than the client's interests, require rigid enforcement of the rule against dual representation where one client is likely to be adversely affected by the lawyer's representation of another client . . . (*Id.* at 98-99).

### C. Disqualification is mandated by the appearance of impropriety; actual impropriety need not be charged or found.

Plaintiff lays great emphasis on the fact that defendants have not shown that any confidential information has in fact been disclosed by Cinerama to Mr. Fleischmann (see, *e.g.*,

Pltf's Br. pp. 14, 32). But whether there has actually been any such disclosure is, as a matter of law, irrelevant. *Hull* v. *Celanese Corporation*, 513 F.2d 568, 572 (2d Cir. 1975); *Emle Industries, Inc.* v. *Patentex, Inc.*, 478 F.2d 562, 571 (2d Cir. 1973); *E. F. Hutton & Company* v. *Brown*, 305 F. Supp. 371, 395 (S.D. Tex. 1969); *T. C. & Theatre Corp.* v. *Warner Bros. Pictures, Inc.*, 113 F. Supp. 265, 269 (S.D.N.Y. 1953). As this Court held in *Emle*: "The court need not, indeed cannot, inquire whether the lawyer did, *in fact*, receive confidential information . . . ." (478 F.2d at 571) (emphasis in original).

The rule is, "even an appearance of impropriety requires prompt remedial action by the court" (*Id.* at 565). Thus, in numerous cases, as in the case at bar, the District Court has disqualified an attorney while finding at the same time that there was no actual or intended impropriety. See, *e.g.*, *General Motors Corporation* v. *City of New York*, 501 F.2d 639, 641 (2d Cir. 1974); *Motor Mart, Inc.* v. *Saab Motors, Inc.*, 359 F. Supp. 156, 158 (S.D.N.Y. 1973). In *General Motors*, Chief Judge Kaufman explained the reason why the mere "appearance of evil" requires disqualification:

> "[T]he Code of Professional Responsibility is not designed for Holmes' proverbial 'bad man' who wants to know just how many corners he may cut . . . . Rather, it is drawn for the 'good man,' as a beacon to assist him in navigating an ethical course through the sometimes murky waters of professional conduct. Accordingly, without in the least even intimating that Reycraft himself was improperly influenced while in Government service, or that he is guilty of any actual impropriety in agreeing to represent the City here,

> we must act with scrupulous care to avoid any appearance of impropriety lest it taint both the public and private segments of the legal profession." (501 F.2d at 649).

The Chief Judge earlier observed, in *Emle*:

> "A lawyer's good faith, although essential in all his professional activity, is, nevertheless, an inadequate safeguard when standing alone. Even the most rigorous self-discipline might not prevent a lawyer from unconsciously using or manipulating a confidence acquired in the earlier representation and transforming it into a telling advantage in the subsequent litigation." (478 F.2d at 571).

**D. Disqualification of an attorney extends to his partners.**

It has long been settled that "all members of a partnership are barred from participating in a case from which one partner is disqualified." *Laskey Bros. of W. Va., Inc.* v. *Warner Bros. Pictures,* 224 F.2d 824, 826 (2d Cir. 1955); *accord, Consolidated Theatres* v. *Warner Bros. Circuit Management Corp.,* 216 F.2d 920 (2d Cir. 1954). This is so even where there is an agreement that fees will not be shared, and that no discussions or exchanges of information will be had. *W. E. Bassett Company* v. *H. C. Cook Company,* 201 F. Supp. 821 (D. C. Conn.), *aff'd,* 302 F.2d 268 (2d Cir. 1962). Mr. Fleischmann's representation of Cinerama thus clearly precludes his partners from simultaneously prosecuting claims against Cinerama.

## Conclusion

There can be no real question as to the propriety of the District Court's order disqualifying plaintiff's attorneys. Certainly there is in this case "the appearance of impropriety due to the on-going possibility for improper disclosure" which this Court has held requires disqualification *Hull* v. *Celanese Corporation,* 513 F.2d 568, 570 (2d Cir. 1975). "Moreover, in the disqualification situation, any doubt is to be resolved in favor of disqualification" (*Id.* at 571). Accordingly, the order of the District Court should be in all respects affirmed.

Respectfully submitted,

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Service of 3 copies of the
within Brief is hereby
admitted this 7th day of
July 1975
Signed Webster Sheffield Fleischmann etc
4:30 P.M. J.S.C.
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